Chan Shek Hoh & Anor v Emzie Luba Services Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D8–22–1795 OF 2004
NALLINI PATHMANATHAN JC
26 JUNE 2009

Contract — Guarantee — Additional guarantee — Agreement between plaintiffs and first defendant for advancement of monies — Agreement containing clause for personal guarantee by second defendant — Whether second defendant party to agreement — Whether contract of guarantee created

The plaintiffs entered into an agreement ('the agreement') with the first defendant which provided that in consideration of the plaintiffs making advances to the first defendant for use in a business activity conducted by the first defendant, the plaintiffs would be assured a financial benefit of 2% of the US Dollar equivalent on the amount advanced, on specified dates, payable monthly, in equal installments over the duration of the advance. The plaintiffs duly advanced a sum of RM500,000. A term of the agreement provided that a third party guarantee in the form of a personal guarantee by the second defendant was accorded to the plaintiffs and that in addition to the personal guarantee, the second defendant confirmed his acceptance of the agreement as an instrument of claim by the plaintiffs on him. The second defendant was not however formally described as a party to the agreement. The plaintiffs initially received the benefits they contracted for but subsequently the first defendant failed to make the payments under the terms of the agreement. The plaintiffs therefore terminated the agreement and demanded the total advance amount together with the financial benefit that had accrued due up to that date. As they received no payment, the plaintiffs initiated this suit. The second defendant claimed that he was not liable as he did not give any guarantee for the repayment of the monies. The issue arising for decision was whether there was a contract of guarantee subsisting between the plaintiffs and the second defendant.

Held, allowing the plaintiffs' claim with cost:

(1) It was clear from the agreement that the second defendant granted a 'third party guarantee' in the form of a personal guarantee to the plaintiffs. This was further supported by the evidence of the first

plaintiff who stated that he would not have entered into the agreement without the 'guarantee' from the second defendant. There was a primary liability belonging to the first defendant to return the monies advanced together with the accrued financial benefits. The second defendant undertook secondarily only to repay the RM500,000. The liability of the guarantor, ie the second defendant was ancillary or secondary to that of the principal, the first defendant (see paras 17–18).

(2) The second defendant who signed the agreement on behalf of the first defendant was aware that the existence of the guarantee clause in the agreement acted as an inducement to the plaintiffs to execute the agreement. This amounted to sufficient communication to the second defendant of the plaintiffs' acceptance of his offer of a guarantee (see para 21).

(3) The consideration to support the guarantee consisted entirely of the advantage given by the plaintiffs, ie the creditors to the principal debtor, the first defendant, in the form of monies advanced to it by the plaintiffs. There was sufficient consideration moving from the plaintiffs to the first defendant at the request of the second defendant (see para 23).

[Bahasa Malaysia summary

Plaintif-plaintif menandatangani satu perjanjian ('perjanjian') dengan defendan pertama dengan syarat bahawa sebagai balasan plaintif-plaintif membuat pendahuluan kepada defendan pertama untuk digunakan dalam aktiviti perniagaan yang dijalankan oleh defendan pertama, plaintif dijamin faedah kewangan 2% Dolar AS bersamaan jumlah yang didahulukan, pada tarikh yang ditetapkan, dibayar secara bulanan, dalam ansuran yang sama sepanjang tempoh pendahuluan. Plaintif mendahulukan sejumlah RM500,000. Satu terma perjanjian yang memperuntukkan bahawa jaminan pihak ketiga dalam bentuk jaminan persendirian oleh defendan kedua diberikan kepada plaintif-plaintif dan sebagai tambahan kepada jaminan persendirian tersebut, defendan kedua mengesahkan penerimaannya terhadap perjanjian tersebut sebagai instrumen tuntutan oleh plaintif-plaintif kepadanya. Walau bagaimanapun defendan kedua tidak diperkenalkan secara formal sebagai pihak kepada perjanjian tersebut. Pada mulanya plaintif-plaintif menerima faedah yang dikontrakkan tetapi defendan pertama kemudiannya gagal untuk membuat pembayaran di bawah terma-terma perjanjian tersebut. Oleh itu plaintif-plaintif menamatkan perjanjian tersebut dan meminta agar jumlah pendahuluan bersama dengan faedah kewangan yang telah terakru sehingga tarikh tersebut. Memandangkan mereka tidak menerima sebarang bayaran, plaintif-plaintif memulakan guaman ini. Defendan kedua mendakwa bahawa dia tidak

bertanggungan kerana dia tidak memberi jaminan untuk pembayaran semula wang tersebut. Isu yang timbul untuk diputuskan adalah sama ada terdapat kontrak jaminan antara plaintif-plaintif dan defendan kedua.

Diputuskan, membenarkan tuntutan plaintif-plaintif dengan kos:

(1) Jelas daripada perjanjian tersebut bahawa defendan kedua diberikan 'third party guarantee' dalam bentuk jaminan persendirian kepada plaintif-plaintif. Ini kemudiannya disokong oleh keterangan plaintif pertama yang menyatakan bahawa dia tidak akan menandatangani perjanjian tanpa 'guarantee' daripada defendan kedua. Terdapat liabiliti utama kepada defendan pertama untuk memulangkan wang yang didahulukan bersama-sama dengan manfaat-manfaat kewangan terakru. Defendan kedua mengaku janji secara sekunder hanya untuk membayar semula RM500,000. Liabiliti penjamin, iaitu defendan kedua adalah sampingan atau sekunder kepada yang utama iaitu, defendan pertama (lihat perenggan 17–18).

(2) Defendan kedua yang menandatangani perjanjian bagi pihak defendan pertama sedar mengenai kewujudan klausa jaminan dalam perjanjian tersebut bertindak sebagai pendorong kepada plaintif-plaintif untuk menyempurnakan perjanjian tersebut. Ini menunjukkan terdapat komunikasi yang memadai kepada defendan kedua mengenai penerimaan tawaran jaminan plaintif-plaintif (lihat perenggan 21).

(3) Balasan untuk menyokong jaminan kesemuanya termasuk faedah yang diberikan oleh plaintif-plaintif, pemiutang kepada penghutang utama, defendan pertama, dalam bentuk wang yang didahulukan kepadanya oleh plaintif-plaintif. Terdapat balasan yang mencukupi daripada plaintif-plaintif kepada defendan pertama atas permintaan defendan kedua (lihat perenggan 23).]

Notes

For cases on guarantee generally, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3809–4093.

Cases referred to

Jays v Sala (1898) 14 TLR 461 (refd)

Legislation referred to

Contracts Act 1950 ss 79, 80

Chandran G Nair (Thevin, Chandran & Associates) for the plaintiffs.
Zulkifli Jafar (Rashid Zulkifli) for the defendants.

Nallini Pathmanathan JC:

INTRODUCTION

[1] In or around 20 November 2000, Chan Shek Hoh a retiree aged seventy three, and his sister Chan Kay Luen, the plaintiffs ('the plaintiffs') entered into an agreement with Ezmie Luba Services Sdn Bhd ('D1') which provided essentially that in consideration of the plaintiffs making advances to D1 for use in a business activity conducted by D1, the plaintiffs would be assured a financial benefit of two per cent (2%) of the US Dollar equivalent on the amount advanced, on specified dates, payable monthly, in equal installments over the duration of the advance ('financial advancement agreement').

[2] The plaintiffs duly advanced a sum Ringgit Malaysia five hundred thousand (RM500,000) comprising, inter alia, Chan Shek Hoh's EPF benefits and savings, towards this investment.

[3] A term of the financial advancement agreement provides (as will be set out in full later) that a third party guarantee in the form of a personal guarantee by D2 is also accorded to the plaintiffs, and that in addition to the personal guarantee, D2 confirms his acceptance of the agreement as an instrument of claim by, inter alia, the plaintiffs on him. D2 was not however formally described as a party to the financial advancement agreement.

[4] The plaintiffs received the benefits they contracted for, for a term of about a year and a half. In January 2002 however, D1 failed to make the payment it was required to, under the terms of the agreement. After some time, the plaintiffs through their solicitors, terminated the agreement and demanded the total advance amount together with the financial benefit that had accrued due up to that date, amounting to RM295,000. As they received no payment, the plaintiffs initiated this suit, claiming the total sum of RM795,000 from D1 and D2 as guarantor. D2 maintains that he is not liable as he did not give any guarantee for the repayment of these monies.

[5] The sole issue that arises for consideration in this case is whether D2 is liable as a guarantor to repay the plaintiffs the monies advanced by them to D1. In other words, does a contract of guarantee subsist between the plaintiffs and D2? This issue will turn on a construction of the financial advancement agreement and a consideration of the relevant factual matrix relating to the said agreement. D1 does not dispute liability under the financial

advancement agreement.

SALIENT FACTS

[6] At the trial of this action, Chan Shek Hoh ('PW1') gave evidence on behalf of his sister and himself. He explained that he was introduced to D2 by one Al' Alim bin Mohd Ibrahim ('PW2'). PW1 learnt from him that D1 was involved in several businesses and required advances for its operations. D2 was a director of D1 together with one Tengku Mohamed Zairuddeen bin Tengku Mohd Zain. PW1 was advised that monies advanced by the plaintiffs would be used overseas for trading in US currency. In return the advancer would enjoy 2% a month on the amount advanced in Malaysian Ringgit. According to PW1 he was also advised that D2 would guarantee the return of the monies. He testified that he would not have advanced the monies he did without such a 'guarantee'. On this basis his sister and he signed the financial advancement agreement.

[7] The sole other witness at trial was Al' Alim bin Mohd Ibrahim, PW2 ('PW2') who had introduced the plaintiffs to this financial investment. He had acted as the intermediary between D1 and D2 and the plaintiffs. PW2 testified that he had introduced PW1 to the scheme, as PW1 was a retiree and wanted to know how he could invest his monies for better returns. Both PW1 and PW2 testified that they understood from the agreement that D2 had accorded a personal guarantee for the return of the monies advanced together with the accruing financial benefit. PW2 also explained that he himself had put monies in D1 on the basis of the individuals involved in the agreement who were members of the Kelantan Royal Family.

SALIENT TERMS OF THE FINANCIAL ADVANCEMENT AGREEMENT

[8] The salient provisions of the financial advancement agreement are as follows:

(i) the named parties to the agreement are the plaintiffs and Emzie Luba Services Sdn Bhd;

(ii) the agreement is stated to be:

> BETWEEN
>
> Mr Chan Shek Hoh (address) and Ms Chan Kay Luen (address) (hereinafter mentioned as 'the Advance Provider') of the one part AND Emzie Luba Services Sdn Bhd (address) and being represented by Tengku Ahmad Zainul Abidin bin Tengku Mohd Zaid and

Tengku Mohamed Zairuddeen bin Tengku Zaid, (hereinafter mentioned as 'the Advance Recipient') of the other part. A

BOTH PARTIES HERETO DULY AGREE

WHEREAS 'the Advance Provider is able and willing to provide a principle sum of fund as financial advancement (hereinafter mentioned as 'the Advance') to the Advance Recipient'. B

WHEREAS 'THE Advance Recipient' is a Company involved in a business activity and is desirous of 'the Advance'.

(iii) 'In consideration that the 'Advance Provider agrees to provide 'the Advance' to the Advance Recipient', the Advance Recipient undertakes to pay the Advance Provider a financial benefit of two per centum (2%) of the US Dollars Equivalent on the Effective Date as stated in the First Schedule (hereinafter mentioned as 'the USD Equivalent') of the Advance Amount per month payable monthly in equal installments over the duration of the Advance and in the same currency as the original Advance Amount AND' C D

(iv) 'The Advance Provider' and the Advance Recipient hereby agree to the appointment of Tengku Ahmad Zainul Abidin bin Tengku Mohd Zaid as the custodian of the Advance AND E

That all transactions related to the business activity shall be made in the name of 'the Advance Recipient' or the Custodian.

(v) *Guarantee and Security for the Advance* F

'*The Advance Recipient guarantees the Advance Provider that there shall be no loss on the USD Equivalent of the Advance Amount and or the financial benefits on the Advance.*

A third party guarantee of 'the USD Equivalent of 'the Advance Amount' in the form of Personal Guarantee by Tengku Ahmad Zainul Abidin bin Tengku Mohd Zaid is also accorded to the Advance Provider. G

In addition to the personal guarantee, the Custodian of the Advance confirms his acceptance of this agreement as an instrument of claim by the Advance Provider and the Advance Recipient on him or his beneficiaries'. H

(vi) 'The Agreement can at anytime be terminated by either party upon giving fourteen days notice in writing without any reasons attached ...

Upon termination of the Agreement the Advance Amount together with any financial benefit accruing shall be returned in full to the extent of the USD Equivalent by the Advance Recipient to the Advance Provider within thirty banking days from the date of the notice of termination being received. The financial benefits shall I

accrue up to the date of receipt of such termination notice. The Advance Amount shall be returned in full to the extent of the USD Equivalent and without any deduction except in case of the exit fee mentioned above and in the same currency as the original financial advancement.'

(vii) This financial advancement agreement was executed by the plaintiffs with one Al Alim bin Mohd Ibrahim ('PW2') having witnessed their signatures. D2 and Tengku Mohamed Zairuddeen bin Tengku Zaid signed on behalf of D1.

ISSUE: IS D2 LIABLE AS A GUARANTOR UNDER THE TERMS OF THE FINANCIAL ADVANCEMENT AGREEMENT TO THE PLAINTIFFS FOR THE MONIES ADVANCED TO D1

[9] As stated at the outset this issue may be determined by a consideration of the relevant clause in the financial advancement agreement together with the relevant surrounding circumstances or the relevant factual matrix. The primary clause that deals with this issue is the clause in the agreement entitled 'guarantee and security for the advance' as reproduced above.

[10] It provides first of all that the advance recipient, ie D1 guarantees the advance provider, ie the plaintiffs that there shall be no loss on the USD equivalent of the advance amount or the financial benefits on the advance. In essence D1 guarantees the plaintiffs that there will be no loss on the monies they advanced or the financial benefits accruing thereto as contracted. This is not in issue.

[11] It is the second and third limbs of this clause that is in dispute. The precise words of the second paragraph provide that 'A third party guarantee of the USD Equivalent of the Advance Amount in the form of Personal guarantee by Tengku Ahmad Zainul Abidin bin Tengku Mohd Zaid is also accorded to the Advance Provider'. In other words, a third party guarantee of the US Dollar equivalent of the amount of money advanced is accorded or given to the plaintiffs in the form of a personal guarantee. The total monies advanced by the plaintiffs amount to RM500,000. Therefore the clause provides that D2 provides a third party guarantee of the US Dollar equivalent of RM500,000 to the plaintiffs in the form of a guarantee.

[12] The third limb of this clause states that in addition to the personal guarantee, the 'custodian of the advance confirms his acceptance of this agreement as an instrument of claim by the advance provider and the advance recipient on him or his beneficiaries. The custodian of the advance is defined in the clause preceding this clause to be D2. Therefore this limb prescribes

that D2 confirms that he accepts the agreement as the contractual document or basis for any claim by the plaintiffs against him. Taken in conjunction therefore, limbs two and three of this clause entitled guarantee and security for the advance appears to create a secondary liability for D2 whereby D2 undertakes to guarantee the monies advanced by the plaintiffs and accepts that the financial advancement agreement comprises the basis for any such claim by the plaintiffs.

[13] As against this, counsel for the defendants maintains that this clause does not and cannot create a liability vis-a-vis D2. D2 submits that he is not a party to the agreement and is therefore not privy to the same. He further maintains that D1 is a completely separate legal entity from D2 and that this clause does not serve to create a secondary liability for D2. As D1 is the sole party to the agreement, the plaintiffs' recourse must lie against D1. No guarantee was intended nor can be construed to subsist from the aforesaid clause. At best it is an offer to grant a guarantee rather than the actual grant of a guarantee. Learned counsel submits that a separate agreement, such as a separate personal guarantee executed by the plaintiffs and D2, is required in order to affix any liability on D2.

WHAT IS A CONTRACT OF GUARANTEE?

[14] A guarantee is a contract whereby the surety or guarantor promises the creditor to be responsible, in addition to the principal, for the due performance by the principal of his existing or future obligations to the creditor, if the principal fails to perform those obligations, (see *Law of Guarantees* (3rd Ed) by Geraldine Andrews and Richard Millet Sweet & Maxwell 2000). *Halsbury's Laws of England* (4th Ed, 1993 Reissue) at para 101 provides:

> A guarantee is an accessory contract by which the promisor undertakes to be answerable to the promisee for the debt, default or miscarriage of another person, whose primary liability to the promise must exist or be contemplated.

[15] Of more relevance is s 79 of the Contracts Act 1950 which provides as follows:

> A 'contract of guarantee' is a contract to perform the promise or discharge the liability of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of which default the guarantee is given is called the 'principal debtor' and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written.

[16] Applying those definitions to the present case, particularly s 79 of the Contracts Act 1950, can it be said that D2 is a guarantor? Is there an

A accessory contract to be found within the purview of the financial advancement agreement whereby D2, as the surety or promisor, undertakes to be answerable to the creditor or promisee, ie the plaintiffs, for the debt or default of the principal debtor, D1, whose primary liability to the promise must exist or be contemplated?

B

[17] It is clear from a perusal of the said clause that D2 grants a 'third party guarantee' in the form of a personal guarantee to the plaintiffs. This is further supported by the evidence of PW1 who stated that he would not have entered into the agreement without the 'guarantee' from D2. That there is a primary C liability belonging to D1 is made clear by the entire agreement, particularly the clause on termination where D1 undertakes to return the monies advanced together with the accrued financial benefits.

D **[18]** It is clear however that D2 undertakes secondarily only to repay the advance amount, namely RM500,000. The essential distinguishing feature of a guarantee therefore subsists namely that the liability of the guarantor, ie D2 is ancillary or secondary to that of the principal, D1.

E **[19]** The issue that arises is whether or not it can be concluded that a contract of guarantee subsists. There is after all, no separate document executed by the plaintiffs and D2 to this effect. A contract of guarantee is formed like any other contract, by offer and acceptance, supported by consideration. The terms of any such guarantee should also be sufficiently F certain in order that the court may give effect to it. The resolution of the question of whether there has been an offer to guarantee or an acceptance of that offer depends on the facts of the instant case and is a matter of construction of the relevant clause above as well as the evidence of the parties.

G **[20]** A perusal of the clause referred to above relating to 'guarantee and security for the advance' shows that by the second limb there is a clear statement by the surety/guarantor, ie D2 to the plaintiffs expressly guaranteeing the repayment of the monies advanced by them. In further support of such a construction is the third limb which expressly provides that H D2 accepts this document as an instrument of claim by the plaintiffs on him. This can only mean that he accepts the financial advancement agreement as a document of guarantee between him and the plaintiffs. It therefore follows that not only is there an offer by D2 to guarantee but that that offer has been accepted by the plaintiffs when they executed the financial services I agreement. The third limb of the said clause leaves no doubt of the intention of parties that this document serves, inter alia, as a contract of guarantee vis-a-vis the plaintiffs and D2.

[21] Further and in any event the plaintiffs have by their evidence through

PW1 made it clear that they acted on the basis of D2's promise to their own detriment. That D2 knew this is borne out by his signature on the agreement. In short D2, who signed the agreement on behalf of D1 was aware that the existence of the clause in the agreement acted as an inducement to the plaintiffs to execute the agreement. This amounts to sufficient communication to D2 of the plaintiffs' acceptance of his offer of a guarantee. See *Jays v Sala* (1898) 14 TLR 461 where the supply of goods by the creditor to the principal in the presence of the surety was held sufficient to constitute acceptance of a written offer to guarantee payment for the principal's personal orders 'should you require it'. In the instant case, even if the second limb of the 'guarantee' clause is construed as amounting to an offer to guarantee, the fact of the acceptance of such an offer is made out by the plaintiffs execution of the financial advancement agreement. However as stated earlier, it appears to this court that the second limb of the 'guarantee' clause creates a guarantee rather than an offer of a guarantee.

[22] A further requirement on general contractual principles is that the contract of guarantee must be supported by 'consideration'. The consideration moreover, must move from the creditor, ie the plaintiffs to the principal debtor, ie D1, at the request of the surety/guarantor, D2. Section 80 of the Contracts Act 1950 provides that:

> Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

[23] In the instant case, the consideration consists entirely of the advantage given by the plaintiffs, ie the creditors to the principal debtor, D1, in the form of monies advanced to it by the plaintiffs. That such a request came from D2 is evident from the fact that D2 was the individual directly responsible for the procurement and receipt of these monies in the name of D1, as well as the subsequent investment of these monies in business activities which were undertaken in his own name. Therefore there appears to be sufficient consideration moving from the plaintiffs to D1 at the request of D2.

[24] One final issue that requires mention is that relating to the issuance of the letter of termination and demand by the plaintiffs' solicitors to D1 and D2. The letter to D2 was returned signifying that he did not receive the same. This however does not in any way detract from his liability because the guarantee in this context is not a demand guarantee.

CONCLUSION

[25] In all the circumstances of the case, it appears to this court for the

reasons set out above, that a contract of guarantee subsists between the plaintiffs and D2. The financial advancement agreement comprises the contractual basis for the plaintiffs' claim against D2 as expressly contracted therein. The requirements for the existence of a contract of guarantee are satisfied. As such, in accordance with the clause on guarantee and security for the advance, D2 is liable in the sum of RM500,000 only to the plaintiffs.

[26] The liability of D1 is for the full sum of RM795,000 as claimed in the statement of claim.

[27] For the foregoing reasons, the plaintiffs are granted judgment as follows:

(i) in the sum of RM795,000 as against D1 together with interest thereon at the rate of 8%pa from the date of the filing of this action until the date of full settlement;

(ii) in the sum of RM500,000 as against D2 together with interest thereon at the rate of 8%pa from the date of the filing of this action until the date of full settlement; and

(iii) costs of this action.

Plaintiffs' claim allowed with costs.

Reported by Kanesh Sundrum